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Supreme Court, U.S.
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No. ____ OFFICE OF THE CLERK

In the
Supreme Court of the United States

DAVID M. CLAPPER,
Petitioner,

v.

TACCO FALCON POINT, INC.,
Respondent.

On Petition for Writ of Certiorari to the Michigan Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent filed a complaint against Petitioner in Michigan state court to domesticate an Indiana judgment, entered by an Indiana state court in favor of Respondent's assignor against Petitioner.

In Michigan, Petitioner argued that the judgment should be neither domesticated nor enforced, because, under Indiana law, the judgment had been satisfied based on events subsequent to the entry of the Indiana judgment. Respondent did not dispute the effect of the application of *Indiana* substantive law, but argued that under *Michigan* substantive law, the judgment would not be satisfied.

The Michigan trial court and the Michigan Court of Appeals believed they were required by federal law and this Court's precedent to apply Michigan substantive law to Petitioner's arguments and defenses to the judgment; and interpreted Michigan law in a way that would render the judgment not satisfied. The Michigan courts therefore ruled that the Indiana judgment may be domesticated and enforced in Michigan, even though the state of rendition (Indiana) would deem the judgment satisfied.

1. Applying Article IV, Section 1 of the U.S. Constitution (the "full faith and credit clause") and 28 USC § 1738 (the full faith and credit statute), if Indiana law is such that the judgment would be satisfied, is Michigan giving full faith **and credit** by domesticating the judgment **and allowing** Respondent to enforce the judgment?

LIST OF PARTIES

The Petitioner is David M. Clapper, a Defendant/Counter-Plaintiff/Third-Party Plaintiff in a civil action in the Oakland County Circuit Court (Case No. 02-042917-CZ); the Appellant in the Michigan Court of Appeals (Case No. 271525); and the Appellant in the Michigan Supreme Court (Case No. 133430).

The Respondent is TacCo Falcon Point, Inc., a Plaintiff/Counter-Defendant in the Oakland County Circuit Court; the Appellee in the Michigan Court of Appeals; and the Appellee in the Michigan Supreme Court.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully petitions for a writ of certiorari to review: (i) a June 1, 2006 Order of the Oakland County Circuit Court (State of Michigan); and (ii) a February 1, 2007 2-1 decision of the Michigan Court of Appeals.

OPINIONS BELOW

The Order of the Oakland County Circuit Court (Case Number 02-42917-CZ) is not a reported decision. It is reproduced in **Appendix B**.

The Michigan Court of Appeals Per Curiam Opinion (Case Number 271525) and the Dissenting Opinion are not reported decisions. They are in **Appendix A** (*see also* 2007 WL 287173, *app. to Mich. Sup. Ct. denied*, 481 Mich. 886; 749 N.W.2d 254 (2008), *reconsideration pending*.

The Michigan Supreme Court Opinion is reported at 461 Mich. 886; 749 N.W.2d 254 (2008). It is in **Appendix C**.

JURISDICTION

Petitioner's application to Michigan's highest court (the Michigan Supreme Court, where all review is discretionary) to review the Michigan Court of Appeals February 1, 2007 Opinion was denied on June 4, 2008.

The jurisdiction of this Court is sought to be invoked pursuant to 28 USC § 1257(a). The petition is timely pursuant to 28 USC § 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section one of Article IV of the United States Constitution reads, in part:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

28 USC § 1738 provides:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

On February 19, 2002, Inland Mortgage Corporation ("Inland") secured a judgment (the "Judgment") in Indiana state court against Petitioner David M. Clapper ("Clapper") and other Defendants, including American Realty Trust, Inc. ("ART"). On March 15, 2002, Inland assigned the Judgment to Respondent TacCo Falcon Point, Inc. ("TacCo).

On August 7, 2002, TacCo filed a complaint against Clapper in Michigan state court to domesticate and ultimately enforce the Judgment in Michigan.

TacCo filed for bankruptcy in a Texas federal bankruptcy court. After the bankruptcy case was dismissed, both TacCo and Clapper filed cross-motions for summary disposition (the equivalent to the federal summary judgment). Clapper argued that under Indiana law the Judgment was satisfied based on facts subsequent to the Judgment's entry. TacCo argued that under Michigan law the Judgment was not satisfied.

The Michigan trial court agreed with TacCo, that: (a) Michigan law, not Indiana law, should apply; and (b) under Michigan law, the Judgment had not been satisfied (although the court agreed that under Indiana law, the Judgment would be deemed satisfied). In making this decision, the trial court relied on the U.S. Constitution's full faith and credit clause (Article IV) and this Court's decision in *Baker by Thomas v. General Motors, Corp*, 522 U.S. 222 (1998), with the trial court believing that it was bound to apply substantive forum law in a case involving the domestication of a judgment. By way of a June 1, 2006 Order (**App. B**), the trial court granted TacCo's motion and denied Clapper's motion.

On July 5, 2006, Clapper timely appealed by right to the Michigan Court of Appeals. Citing *Baker*, the Court of Appeals, in a February 1, 2007 2-1 decision (**App. A**), affirmed.

On March 15, 2007, Clapper timely filed an application for leave to the Michigan Supreme Court. The Michigan Supreme Court's decision to take a case is discretionary. In a June 4, 2008 6-1 decision, the Michigan Supreme Court declined to hear the appeal (**App. C**), with the majority finding, as it often does in declining review, that it was "not persuaded that the questions presented should be reviewed by this Court." Justice Michael F. Cavanagh dissented, stating that he would remand the case to the trial court for the reasons set forth in Court of Appeals Judge Peter D. O'Connell's February 1, 2007 dissenting opinion.

On June 20, 2008, Clapper timely sought reconsideration of the Michigan Supreme Court's denial of leave. The motion is pending.

Clapper has now timely petitioned this Court for a writ of certiorari to the Michigan Court of Appeals.

STATEMENT OF THE FACTS

In 1996, Atlantic Limited Partnership XII borrowed $2.2 million from Inland.[1] The funds were to be used to fund the purchase of an apartment project located in Indianapolis, Indiana known as Country Squire Apartments ("Country Squire").[2] The loan was secured

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[1] *See* Petitioner's May 8, 2006 Brief in Support of Motion for Summary Disposition against ART Midwest, LP ("**PBISSD ARTM**"), p. 2 (Oak. Ct. Cir. Ct.).

[2] *See id.*

by a mortgage on Country Squire and a note.[3] Clapper and Third-Party Defendant ART guaranteed payment of the note.[4]

When the loan went into default, Inland sued Clapper and ART (and others) in Indiana state court for payment of the deficiency.[5] On February 19, 2002, the Indiana court entered a $3.2 million Judgment in favor of Inland against Clapper and ART (and others).[6] The Judgment additionally required Country Squire to first be sold at a sheriff's sale, with the proceeds to Inland to pay the Judgment.[7]

In late February and early March, ART secretly entered into negotiations with Inland to "purchase" the Judgment.[8] A Settlement Agreement was reached where Inland agreed to assign the Judgment to an entity ART designated as "Purchaser" in exchange for the following consideration:

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[3] *See id.*

[4] *See id.* at p. 3.

[5] *See id.* at p. 4.

[6] *See id.* *See also* Petitioner's May 8, 2008 Brief in Support of Petitioner's Motion for Summary Disposition against TacCo ("**PBISSD TAC**"), p. 2.

[7] *See* Petitioner's August 28, 2006 Brief on Appeal ("**PBOA**"), Ex. 2, pp. 8-9 (Mich. Ct. App.). *See also* **PBISSD TAC** at p. 2 & Ex. B, pp. 8-9 (2/19/02 Order of the Marion County Circuit Court).

[8] *See* **PBISSD TAC** at pp.3-4.

(i) $1.5 million in cash;
(ii) A $1.5 million note, guarantied by ART's parent, American Realty Investors (into which ART has merged);
(iii) An agreement by the eventual Purchaser not to sell Country Squire at foreclosure for less than $1,000,000.00;
(iv) A $250,000.00 letter of credit in favor of Inland; and
(v) Inland's retention of a security interest in the Judgment through a conditional assignment.[9]

On March 1, 2002, ART paid Inland $100,000.00 to extend the closing deadline two weeks.[10] Also on March 1, 2002, ART caused papers to be filed with the State of Nevada, creating and incorporating TacCo.[11] TacCo was created for the sole purpose of becoming "Purchaser" of the Judgment.[12] The record below demonstrates that ART controls TacCo.[13]

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[9] *See* **PBISSD TAC** at pp.3-4 & Ex. C (Settlement Agreement).

[10] *See* **PBISSD TAC** at p. 7 & Ex. K (wire transfer form).

[11] *See* **PBISSD TAC** at p. 3 & Ex. D (incorporation papers).

[12] *See* **PBISSD TAC** at p. 3 & Ex. E, p. 32 (Dep. Tr. Wayne Starr).

[13] *See* **PBISSD TAC** at pp. 4-20 & Exs. C-T, V; Petitioner's May 17, 2006 Brief in Opposition to Respondent's Motion for Summary Disposition against TacCo ("**PBIOSD TAC**"), pp. 2, 5-9 & Exs. A-K (Oak. Ct. Cir. Ct.); **PBOA**, pp. 3-20, 25-30.

In accordance with the Settlement Agreement, on or about March 13, 2002, ART wired Inland nearly $1.5 million cash; TacCo executed the $1.5 million note; ART wired $250,000.00 to TacCo for the letter of credit; Gene Phillips, whose family controls ART, guaranteed payment on the letter of credit; and TacCo entered into the aforementioned foreclosure agreement.[14] On March 15, 2002, pursuant to an agreement negotiated and drafted by ART (not TacCo), Inland assigned the Judgment to TacCo.[15]

In exercising rights under the conditional assignment, Inland was limited to collection of no more than $1.5 million.[16] In other words, Inland gave ART credit against the Judgment for the $1.5 million cash payment. TacCo thereafter made the agreed minimum $1 million credit bid at an auction.[17] As such, when including the May 1, 2002 $100,000 wire transfer, the Judgment should have been worth no more that $600,000 ($3.2m - $1.5m - $100,000 - $1.0m).[18]

In 2002, TacCo filed a complaint against Clapper in Michigan's Oakland County Circuit Court ("Trial Court"), seeking to domesticate and enforce the

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[14] *See* **PBIOSD TAC**, Ex. A; **PBOA**, Exs. 11, 16, 25.

[15] *See* **PBISSD TAC**, p. 3; **PBOA**, p. 4.

[16] *See* **PBISSD TAC**, Ex. C, ¶ 3(b).

[17] **PBOA**, pp. 3-4.

[18] *See* **PBISSD TAC**, pp. 19-20.

Judgment.[19] TacCo argued that it held a $3.2 million Judgment, less the $1 million foreclosure, and sought a $2.2 million judgment against Clapper. Clapper defended by arguing (among other arguments) that the Judgment was satisfied because a co-Judgment debtor, ART, paid the Judgment, either directly or through ART's strawman/instrumentality/alter ego --- TacCo.[20]

TacCo filed a motion for summary disposition (Michigan's equivalent to the federal summary judgment), arguing that Clapper's defenses, while dispositive in Indiana, were not available in Michigan. Clapper filed his own motion for summary disposition pursuant to Michigan Court Rules 2.116(C)(10), 2.612

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[19] Naturally, TacCo never sought to collect on the Judgment from ART, its alter ego.

[20] *See* **PBIOSD TAC**, pp. 2-3, 5; **PBOA**, pp. 3-15 (Mich. Ct. App.); **PBISSD TAC**, pp. generally 1-20, Ex. A; Petitioner's May 22, 2006 Reply Brief in Support of Motion for Summary Disposition against TacCo ("**PRBISSD TAC**"). Clapper made these same arguments in Indiana state court. However, when Clapper made the arguments and the trial judge ordered expedited discovery on the satisfaction arguments, ART caused TacCo, nary two months old, to file for bankruptcy in a federal court in Texas Case. Case Nos. 02-42876-S; 02-04271 (Bankr. E.D. Tx.)(Hon. Donald R. Sharp). **PBIOSD TAC**, pp. 4-5; **PBOA**, p. 1.

(C)(1)(e), MCR 2.620(3),[21] based in part on the arguments set forth above.[22]

Clapper asked the Trial Court to apply Indiana substantive law to his arguments.[23] In Indiana, when a co-judgment debtor uses a strawman to "purchase" the judgment, the judgment is deemed satisfied; i.e., he can't buy the judgment (through himself or through a straw entity); he only pays the judgment.[24] By way of information, Black's Law defines a strawman as follows:

> Straw man or party. A "front"; a person who is put up in name only to take part in a deal. Nominal party to a transaction; one who acts as an agent for another for the purpose of taking title to real property and executing whatever documents and instruments the principal may direct respecting the property. Person who

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[21] "[MCR 2.620] provides for a hearing procedure to permit the court to determine if the judgment has been satisfied." *Oakwood Hospital v. Tobin*, 6 Mich. App. 566, 570; 149 N.W.2d 890 (1967) (emphasis omitted). "The court shall hear proofs to determine whether the order should be entered." MICH. CT. R. 2.620 (3).

[22] **PBISSD TAC**, pp. 8-17; **PBOA**, p. 22.

[23] *See supra* nn. 20-22.

[24] *See id.* and *see* PBOA, pp. 8-9, and *see also, e.g., Klippel v. Shields*, 90 Ind. 81, 82-83 (1883); *Hubble v. Berry*, 180 Ind. 513, 521; 103 N.E. 328 (1913); *Zimmerman v. Gaumer*, 152 Ind. 552, 560-61; 53 N.E. 829 (1899); *Lapworth v. Jones*, 133 Ind. App. 388, 392-93; 182 N.E.2d 453 (1962); *Lillie v. Dennert*, 232 F. 104, 108-09 (6th Cir. 1916).

> purchases property for another to conceal identity of real purchaser.[25]

Clapper argued and supported below with evidence that TacCo was, in fact, ART's strawman.[26]

The Trial Court appeared to concede that if Indiana law applied, the judgment would be deemed satisfied.[27] However, in addressing Clapper's argument (e.g., that, in determining the continuing validity of a judgment, a domesticating state should apply the law of the rendition state in accord with the venerable authority of *Hampton v. M'Connel*, 16 U.S. 234, 235 (1818)),[28] the Trial Court ruled that "Enforcement measures do not travel with the sister state judgment as preclusive effects do," citing this Court's decision in *Baker by Thomas v. GMC*, 522 U.S. 222, and "the strawman defense is not available to Defendant as it is not

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[25] BLACK'S LAW DICT. (5th ed. 1979) p. 1274, col. 1. *See also Hoosier v. Lander*, 14 Cal. App. 4th 234, 238 & n.4 (Ct. App. Cal. 1993)

[26] **PBISSD TAC**, pp. 3-17 (and exhibits); **PBIOSD TAC**, 1-19 (and exhibits); **PBOA**, pp. 3-15 (and exhibits). **PRBISSD TAC**, pp. 1-5.

[27] May 31, 2006 Transcript of Hearing of Oakland County Circuit Court, p. 18 ("However, the next question is whether the strawman defense can be raised in Michigan where it is not recognized here but is available in Indiana."). *See also* **PBOA**, Ex. 13.

[28] **PBIOSD TAC**, pp. 2-3; **PBOA**, pp. 10-11.

recognized in the state of Michigan."[29] The Trial Court therefore entered judgment in favor of TacCo.[30]

The Michigan Court of Appeals, in a 2-1 decision, affirmed the Trial Court's disposition:

> [I]n *Baker v General Motors, Corp*, 522 US 222, 235; 118 S Ct 657; 139 L Ed 2d 580 (1998), the U.S. Supreme Court held that "[f]ull faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the evenhanded control of forum law."[31]

Citing to Michigan law and other authority, the Court of Appeals held:

> Under the above authorities, the circuit court correctly concluded that Michigan law, not Indiana law, controls with regard to the present action. . . . These various issues [Clapper's strawman arguments], dealing with the

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[29] *See supra* n. 26 at p. 19.

[30] **App. B**, 22a-24a.

[31] **App. A**, 6a.

> enforcement of the judgment, are governed by Michigan law. *Baker*, *supra* at 235.[32]

One point of agreement was that domesticating states may apply their court and statutory procedures to the mechanism of enforcement of a judgment. But as dissenting Court of Appeals Judge Peter D. O'Connell recognized, if a judgment is satisfied, there is nothing to enforce. And therefore, there needed to be a preliminary inquiry into whether the Judgment had been, in fact, satisfied.[33] Clapper agreed and argued such a preliminary inquiry had nothing to do with procedure, sheriffs, writs of garnishment, liens, or the like. Those issues only become relevant if a judgment were properly domesticated. The inquiry Clapper wanted and Judge O'Connell voted for was about which state's substantive law should govern the inquiry of whether the Judgment was satisfied. Clapper argued that the law of the state rendering the Judgment should apply: Indiana.

The Michigan courts, however, applied Michigan law. It is not that Michigan's courts believed that a substantive Michigan policy was materially implicated or that there was something about Indiana law that was offensive. The Michigan courts' beliefs were grounded in their interpretations of the U.S. Constitution, federal law, and their beliefs that this

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[32] **App. A**, 6a-8a ("We apply Michigan law to these enforcement proceedings," *citing* Baker, 522 U.S. at 235).

[33] **App. A**, 19a-21a & n.1.

Court's decisions compelled the application of Michigan law.[34]

SUMMARY OF THE ARGUMENT

Clapper seeks a writ of certiorari to the Michigan Court of Appeals and requests that this Court hold that the full faith and credit clause (Article IV of the U.S. Constitution) and the full faith and credit statute (28 USC § 1738) require or at least permit states domesticating judgments to apply the substantive law of the state of rendition to defenses to the judgment.

This is *not*, contrary to the Michigan Court of Appeals' Opinion, a collateral attack on the merits of the Judgment. Clapper's arguments are grounded in post-judgment facts that would deem the judgment satisfied, primarily that the Judgment has been paid. Which state's law applies in determining whether or not there has been payment is the whole ballgame. Clapper argues that in these circumstances Indiana law should be applied, based on this Court's precedent and the purposes underlying full faith and credit.[35]

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[34] *See supra* nn. 27, 29-33.

[35] Consider another argument in a similar vein. If Inland came to Michigan tomorrow to domesticate and enforce the Judgment, Clapper would argue that the Judgment should not be domesticated or enforced because Inland no longer holds the Judgment. If, however, there were some disagreement as to whether there had been, in fact, an assignment, that analysis should be judged by Indiana law, not Michigan law.

The parties and the courts of Michigan in this case appear to agree that if Petitioner's arguments were judged by Indiana law, the state of rendition, the judgment would be satisfied. Michigan's courts, however, held that under this Court's precedents in *Hampton v. M'Connel*, 16 U.S. 234, 235 (1818) and *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 235 (1998), that Michigan was required to apply substantive forum law when the continued viability of a judgment is challenged. Michigan's courts ultimately interpreted Michigan law in a way that would render the judgment unsatisfied and therefore enforceable.

The issue for these parties is critical. Depending on which state's law applies, either a $2.2 million judgment is satisfied or it is not. The State of Michigan looked to the U.S. Constitution, federal statute, and this Court's precedents to make that decision. Therefore, a federal question is presented.

This case gives this Court a perfectly postured opportunity to define the contours of what full faith and credit means when the rendition state's law says one thing and the domesticating state says another. Consideration of the issues in this case has the potential to impact the effect of every judgment rendered in the state courts of the United States. Moreover, the proper interpretation of the full faith and credit clause is one of the most important threads binding an otherwise polite fraternity of sovereign states into an indestructible union of United States. It goes to the essence of what it means to be a Union, because the states' reciprocal dignity owed to each

other has its guts in Article IV. It is, respectfully, worthy of this Honorable Court's analysis.

ARGUMENT

This Court has defined the purpose of Article IV's full faith and credit clause as follows:

> [T]o alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.[36]

Congress codified Article IV's mandate in 28 USC § 1738.[37] Since federal law determines the measure of faith and credit one state must give another state's judgment,[38] federal questions were presented and decided in Michigan's courts which Clapper requests that this Court review.

This Court's precedent suggests that the full faith and credit clause requires the forum state to apply the

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[36] *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 276-77 (1935).

[37] *See Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 270 (1980).

[38] *See id.* at 272 & n. 15.

law of the rendition state when interpreting the validity and continued viability of a judgment:

> [T]he judgment of a state court should have the same credit, validity and effect, in every other court of the United States, which it had in the state where it was pronounced, and that **whatever pleas would be good to a suit thereon in such state, and none others, could be pleaed in any other court in the United States. . . . That in every case arising under the act, the only inquiry is, what is the effect of the judgment in the state where it was rendered.**[39]

State courts have held similarly. For example, courts in West Virginia, Texas, and North Carolina have held that "In order to ensure that another state's judgment is given the same force and effect it would have in that state, the general rule appears to be that [t]he validity and effect of a judgment must be determined by reference to the laws of the state where

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[39] *Hampton v. M'Connel*, 16 U.S. 234, 235 (1818) (emphasis added), *citing Mills v. Duryee*, 7 Cranch 481, 484 (1813). *See also Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health*, 455 U.S. 691, 704 (1982) ("This Court has consistently recognized that, in order to fulfill this constitutional mandate, the judgment of a state court should have the same credit, validity, and effect, in every other court of the United States, which it had in the state where it was pronounced.") (quotes and citation omitted).

it was rendered."[40] To that end, Justice Kennedy has written:

> The beginning point of full faith and credit analysis requires a determination of the effect the judgment has in the courts of the issuing State. In our most recent full faith and credit cases, we have said that determining the force and effect of a judgment should be the first step in our analysis.[41]

Indiana law should have been applied in Michigan's courts. And since the Judgment would no longer have force in Indiana,[42] it should not have been domesticated or enforced in Michigan. "The full faith and credit clause does not . . . protect a judgment . . . [that] has been paid."[43]

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[40] *Jordache Enterprises, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 204 W.Va. 465, 474; 513 S.E.2d 692 (1998) (internal quotes omitted), *citing* 50 C.J.S. § 969, p. 563. *See also Bard v. Charles R. Myers Ins. Agency, Inc.*, 839 S.W.2d 791, 795 (Tex. 1992) ("The validity of the judgment is determined by the laws of the state where it was rendered."); *Freeman v. Pacific Life Ins. Co.*, 156 N.C.App. 583, 587; 577 S.E.2d 184 (2003) ("The law of the rendering court is reviewed to determine whether the judgment is valid.").

[41] *Baker*, 522 U.S. at 247 (Kennedy, J., concurring).

[42] *See supra* n. 24.

[43] *Trauger v. A.J. Spagnol Lumber Co., Inc.*, 442 So.2d 182, 183 (Fla. 1983), *relying on Milwaukee County*, 296 U.S at 275.

Under this Court's more modern precedent, the law the domesticating state applies appears to be at least discretionary: "[U]nder the Full Faith and Credit Clause . . . a court can lawfully apply either the law of one State or the contrary law of another."[44] It certainly does not *require* the domesticating state to apply its own law.

The Second Restatement of Conflict of Laws publishes the academy's position that while the domestication state determines the *procedure* for consideration of defenses to the judgment, the state of rendition supplies the *law* to test those defenses:

> [T]he local law of the state of rendition will be applied to determine whether equitable relief can be obtained against the judgment. On the other hand, the local law of the state where recognition of enforcement of the judgment is sought determined the procedure for obtaining such relief.[45]

In particular, comment b to § 116 states:

> A judgment creditor will not be permitted to obtain greater relief than that to which he is entitled under the local law of the state where the judgment was rendered.[46]

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[44] *Sun Oil Co. v. Wortman*, 486 U.S. 717, 727 (1988).

[45] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 115. **PBOA**, pp. 20-22.

[46] **PBOA**, pp. 20-22.

Michigan's courts allowed just that, giving TacCo greater relief in Michigan than that to which TacCo would be entitled in Indiana. The first illustration in § 116 shows, by analogy, what should have occurred in this case:

> In state X, A obtains a judgment for $1,000 against B in compensation for personal injuries suffered in an automobile accident by reason of B's negligence. Under X local law, the judgment is thereupon discharged . . . . [and] [t]he judgment is no longer subject to enforcement in other states.

The Michigan courts construed this Court's decision in *Baker by Thomas v. GMC* as requiring domesticating states to apply *forum* law, both procedural *and* substantive, to defenses to the judgment, relying on this language:

> Full faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the evenhanded control of forum law.

Clapper respectfully believes that this statement means only that once a judgment is domesticated, the *enforcement* of the judgment is subject to local law. For example, if the Judgment were properly domesticated, TacCo would be required to follow Michigan law in terms of obtaining writs of

garnishment for a Michigan bank account owned by Clapper (following Michigan court and statutory procedure, using Michigan garnishment forms, referring to Michigan statute as to whether a given account may legally be garnished, etc.); or judgment liens against Michigan property owned by Clapper (using court and Michigan statutory procedure for execution, using approved Michigan judgment lien forms, complying with Michigan sheriff sale procedures, etc.). This is because requiring a Michigan sheriff to understand the vagaries of Indiana foreclosure law when the sheriff is foreclosing on a piece of Michigan property would impose an undue burden on the domesticating state, and one not necessary to achieve the goals of full faith and credit.

Here, however, the only "burden" is requiring state judges to answer the *preliminary* question as to whether the judgment has been satisfied. And if this requires state judges to apply the law of rendition states, that is something state judges are able and well equipped to do. It is something state judges do every day.[47]

Moreover, it makes sense to apply rendition law in situations like the one presented here. What connection does Michigan have to the continued viability of an Indiana Judgment, based on facts divorced entirely from Michigan? The only reason this

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[47] State judges make conflict of law decisions every day in tort and contract cases. State courts are also required to apply federal law when the situation calls for it. *See Testa v. Katt*, 330 U.S. 386, 389-94 (1947).

Judgment was deemed "unpaid" is because of the happenstance of Clapper's ownership of Michigan property. But as this Court has held:

> [F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.[48]

Michigan, respectfully, does not have the power to augment the Indiana judgment in to something else or make it something that it is not, particularly when Michigan has no stake, policy, or interest in whether or not the Judgment is domesticated and enforced. Allowing what occurred in Michigan's state courts is the opposite of full faith and credit, when Indiana would no longer recognize the Judgment. "[T]he key issue is whether the Judgment is enforceable where rendered . . . ." What, then, would Indiana do?[49] And in answering that question, everyone agrees what Indiana would do; it would deem the Judgment paid.

Furthermore, there are recognized exceptions to giving full faith and credit to judgments of sister states, like when the rendition state lacked personal jurisdiction over the defendant, or when the judgment

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[48] *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981); *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 494 (2003).

[49] *See In re Transamerica Airlines, Inc.*, No. Civ.A. 1039-VCP2007 WL 1555734, *8 (Del.Ch. May 25, 2007)

was procured by fraud. Rendition state law, not a domesticating state's law, governs those collateral defenses to the judgment.[50]

By analogy, Clapper's approach is consistent with what federal courts do when domesticating a diversity judgment from another federal court in another state: "[A]n enforcing court should apply the law of the state courts in the state where the rendering federal court sits . . . ."[51] By way of example, a federal court applies the rendering state's preclusion law to determine the preclusive effects of a state court's final judgment.[52]

Requiring the application of rendition law would also support uniformity. One of the purposes of the full faith and credit clause is to make a final decision of one court uniform throughout the United States, protecting the integrity of the rendition state and giving legal clarity to rights of the parties to that

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[50] *See, e.g., Griffin v. Griffin*, 327 U.S. 220 (1946) (petitioner's challenge, based on due process and fraud, to respondent's efforts to domesticate a New York judgment in the District of Columbia should be analyzed by New York law); *Capitol Indem. Corp. v. St. Paul Fire & Marine Ins. Co.*, 357 F.Supp. 399, 410 (D.C.Wis. 1972) ("Under 28 U.S.C. § 1738, the amended judgment must be given the same effect and credit as it would receive in the courts of Wisconsin, where it was rendered. Wisconsin law must govern the available grounds for collateral attack.").

[51] *Palmer & Cay, Inc. v. Marsh & McLennan Companies, Inc.*, 404 F.3d 1297, 1310 (11th Cir. 2005).

[52] *See Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984).

action.[53] To open up the continued validity of a judgment to the interpretation of fifty state laws would undermine uniformity. The parties' rights and duties were judged according to Indiana law in an Indiana court, leading to an Indiana judgment. The continuing validity of the judgment should therefore be judged in accordance with Indiana law, not the law of the state where the defendant happens to own property. The fact that the Indiana Judgment and the now-domesticated Michigan Judgment will be treated markedly different undercuts the salutary purpose of the full faith and credit clause.

In spite of all this, the Michigan Court of Appeals held that "We apply Michigan law to these enforcement proceedings." While state courts may prefer to apply their own laws for their own reasons (be they based on reasons of sovereignty, ease, or parochial attitudes), "The full faith and credit clause is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation. If in its application local policy must at times be required to give way, such 'is part of the price of our federal system."[54] If full faith and credit means what it says, then under these facts, the Judgment should be satisfied, regardless of Michigan's approach to domesticating and enforcing judgments.

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[53] *See Underwriters Nat. Assur. Co. v. North Carolina Life and Acc. and Health Ins. Guaranty Ass'n*, 455 U.S. 691, 704 (1982).

[54] *Sherrer v. Sherrer*, 334 U.S. 343, 354 (1948) (internal quotes omitted).

Why didn't Clapper seek such a determination in Indiana? He tried. When Clapper made the strawman and payment arguments, the Indiana trial judge ordered expedited discovery on the issues. ART ***immediately*** caused TacCo (which had literally *just* been incorporated) to remove the case to an Indiana federal court, whereupon the case was transferred to a federal bankruptcy court in Texas, where things were stalled for a substantial time.[55] When Clapper tried to present his strawman and payment arguments to the bankruptcy court, the court believed it was not the appropriate fora for such resolution because of its limited jurisdiction and because "allegations of a strawman transaction requires the application of Indiana law . . . ."[56] TacCo then moved for summary disposition in the Michigan trial court, which dealt with the issue swiftly. And here we are.

A grave injustice has occurred. This Court has the opportunity to right what was wrong and at the same time publish what full faith and credit means when the rendition state's law says one thing and the domesticating state's law says another. Full faith and credit is fundamental to America's idea of what it means to be a federal union of states. As such, a rule of law should be fashioned with deft precision and crystal clarity.

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[55] **PBIOSD**, pp. 4-5; **PBOA**, p. 1. Case Nos. 02-42876-S; 02-04271 (Bankr. E.D. Tx.)(Hon. Donald R. Sharp)

[56] **PBIOSD**, pp. 4-5; **PBOA**, p. 1. **PBOA, Ex. 31**, p. 8 (August 12, 2003 Order of the U.S. Bankruptcy Court for the Eastern District of Texas (Case No. 02-42876-S) (Hon. Donald R. Sharp).

Because the stakes are high, both personally and jurisprudentially, we respectfully submit that this is a case that this Court should review.

CONCLUSION

For the foregoing reasons, Petitioner David Clapper respectfully requests that the Court grant his petition, and issue a writ of certiorari to the Michigan Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

STATE OF MICHIGAN COURT OF APPEALS

UNPUBLISHED

No. 271525
LC No. 2002-042917-CZ

[Filed February 1, 2007]

TACCO FALCON POINT, INC.,
Plaintiff/Counter-Defendant-Appellee,

v

DAVID M. CLAPPER,
Defendant/Counter-Plaintiff/
Third-Party Plaintiff-Appellant/
Cross-Appellee,

v

ART MIDWEST, INC.,
Intervening Third-Party Defendant-
Appellee/Cross-Appellant,

and

AMERICAN REALTY INVESTORS, INC.,
Third-Party Defendant-Appellee,

and)
)
AMERICAN REALTY TRUST, INC.,)
Third-Party Defendant-Appellee/)
Cross-Appellant,)
)
and)
)
ART MIDWEST, L.P.,)
Third-Party Defendant.)
_____)

No. 271552
Oakland Circuit Court
LC No. 2005-066850-CZ

_____

DAVID M. CLAPPER,)
Plaintiff-Appellant,)
)
v)
)
TACCO FALCON POINT, INC.,)
Defendant-Appellee.)
_____)

Before: Meter, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Defendant David Clapper (Clapper) appeals as of right from the circuit court's order granting summary disposition to plaintiff TacCo Falcon Point, Inc. (TacCo). The court concluded that Clapper was liable to TacCo under a consent judgment signed in Indiana. Clapper takes exception to this ruling and also to a

ruling by the court that dismissed third-party defendant American Realty Investors (ARI) from the case. Third-party defendant American Realty Trust, Inc. (ART) cross-appeals, arguing that the court erred in rejecting ART's argument that Clapper's third-party contribution claim against ART was invalid and that ART was therefore entitled to summary disposition. Intervening third-party defendant Art Midwest, Inc (ARTM), a court-appointed liquidator of defendant Art Midwest, L.P. (ARTMLP) (one of the entities sued by Clapper for contribution), also cross-appeals, arguing that the circuit court should have granted summary disposition to ARTM with respect to Clapper's claims against ARTMLP, because ARTMLP has been dissolved. We affirm in all respects except with regard to the claims involving (1) the dissolution of ARTMLP and (2) the liability of ARI.

ART and a related entity, along with Clapper and his related entity, defaulted on a loan owed to Inland Mortgage Company (Inland). The loan had been made in connection with the purchase of an apartment complex in Indiana. After litigation in Indiana, ART and Inland reached a settlement whereby Inland agreed to reduce its claim from nearly $3,400,000 in exchange for entry of a judgment for $3,200,000. The judgment provided that ART and Clapper were jointly and severally liable for the $3,200,000. Clapper's attorney signed the consent judgment.

Inland later assigned the judgment to TacCo in exchange for a payment of $3,000,000. $1,500,000 was paid up front, and TacCo signed a note for the remaining $1,500,0000. Inland retained a security interest in the judgment. The assignment agreement

required that TacCo make a minimum creditor's bid of $1,000,000 at the Sheriff's sale of the apartment complex. TacCo did so, and, because it was the only bidder, it acquired the property. The amount due under the judgment was therefore reduced to $2,200,000. TacCo then filed the instant Michigan action to enforce the judgment against Clapper, who resides in Michigan.

Clapper and TacCo filed motions for summary disposition. Clapper argued, in part, that ART had actually incorporated TacCo and that the entities should be considered one and the same for purposes of enforcing the judgment. Clapper argued that, in accordance with the "strawman" defense available under Indiana law, the judgment must be deemed *satisfied* (and therefore extinguished as applied to Clapper) because Inland, in assigning the judgment to TacCo, had in actuality assigned the judgment to one of the debtors, ART. Clapper argued, in essence, that ART had used a strawman, TacCo, in order to keep the judgment alive as applied to Clapper. The circuit court rejected Clapper's arguments, stating that the law of Michigan applied to the instant action and that the strawman defense is not available in Michigan. The court, after addressing additional defenses raised by Clapper, granted TacCo's motion for summary disposition, which TacCo had brought under MCR 2.116(C)(10).

On appeal, Clapper first argues that the court erred in rejecting the strawman defense, and, accordingly, in granting summary disposition to TacCo.

We review do novo a trial court's grant or denial of summary disposition. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995).

> A motion for summary disposition may be granted pursuant to MCR 2.116(C)(10) when, except with regard to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Giving the benefit of reasonable doubt to the nonmoving party, the trial court must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ.

The moving party has the initial burden of supporting its position that there is no genuine issue of material fact by pointing to affidavits, depositions, admissions, or other documentary evidence in the record. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the nonmoving party to show that a genuine issue of material fact does exist. *Id.*

Clapper contends that Indiana law, and particularly the strawman defense available under Indiana law, should apply to the present action. We disagree. In MCL 691.1171, Michigan adopted the Uniform Enforcement of Foreign Judgments Act, which provides as follows in MCL 691.1173:

> A copy of a foreign judgment . . . may be filed in the office of the clerk of the circuit court, the district court, or a municipal court of this state.

> The clerk shall treat the foreign judgment in the same manner as a judgment of the circuit court, the district court, or a municipal court of this state. *A judgment filed under this act has the same effect* and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying *as a judgment of the circuit court*, the district court, or a municipal court *of this state* and may be enforced or satisfied in like manner. [Emphasis added.]

Furthermore, in *Baker v General Motors, Corp*, 522 US 222, 235; 118 S Ct 657; 139 L Ed 2d 580 (1998), the U.S. Supreme Court held that

> [f]ull faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the evenhanded control of forum law.

Similarly, the Restatement (Second) of Conflict of Laws § 99 (1969) provides that "[t]he local law of the forum determines the methods by which a judgment of another state is enforced."

Under the above authorities, the circuit court correctly concluded that Michigan law, not Indiana law, controls with regard to the present action. Clapper argues that the above authorities are not dispositive because his primary argument is not

concerned with TacCo's manner of enforcing the judgment but instead concerns whether the judgment has been satisfied (and therefore extinguished as applied to Clapper). Clapper's argument elevates form over substance. Clearly, TacCo is seeking to enforce the judgment against Clapper, and Clapper is resisting that enforcement by raising various arguments, including the strawman argument. These various issues, dealing with the enforcement of the judgment, are governed by Michigan law. *Baker*, *supra* at 235. To further support his claim, Clapper cites the Restatement (Second) of Conflict of Laws § 115 (1971), which states that "[a] judgment will not be recognized or enforced in other states if upon the facts shown to the court equitable relief could be obtained against the judgment in the state of rendition." However, Clapper has cited no basis for obtaining equitable relief against the judgment, which was a validly signed and entered consent judgment. Instead, Clapper is merely trying to avoid enforcement of the judgment based on actions that occurred after the valid entry of the judgment. Clapper also cites the Restatement (Second) of Conflict of Laws § 116 (1971), which states that "[a] judgment will not be enforced in other states if the judgment has been discharged by payment or otherwise under the local law of the state of rendition." Here, the judgment has *not* been discharged and there is certainly no satisfaction of judgment found in the record. Indeed, the consent judgment, under which Clapper is liable, remains in effect, and TacCo is seeking to enforce it. Clapper also cites the case of *Ward v Hunter Machinery Co*, 263 Mich 445, 456; 248 864 (1933), in which the Court stated that

> [t]he judgment of a state court should have the same credit, validity, and effect, in every other court in the United States, which it had in the state where it was pronounced, and . . . whatever pleas would be good to a suit thereon in such state, and none others, [can] be pleaded in any other court in the United States. [Citation and quotation marks omitted.]

Again, however, the consent judgment is not being challenged here. Instead, Clapper is trying to avoid enforcement of the judgment. We apply Michigan law to these enforcement proceedings. *Baker*, *supra* at 235.

Clapper argues that, even if Indiana law does not apply here, the circuit court nonetheless erred in granting summary disposition to TacCo because the strawman defense is in fact recognized in Michigan. We disagree. Clapper has not cited any binding or persuasive authority indicating that the strawman defense, whether referred to as such or referred to by another name, is recognized in Michigan. Clapper additionally argues that we must deem the judgment satisfied in this case because to do otherwise would be contrary to public policy. Clapper states in his appellate brief:

> It would be inherently unfair and unjust, thus against public policy, to allow a co-judgment debtor to satisfy a judgment[] (like ART did with Inland), and then arrange for the assignment of the judgment to an entity later created and then controlled by the co-judgment debtor, for purposes of enforcing the entire

> judgment only against other co-judgment debtors, i.e. Clapper.

Clapper's argument is unavailing. Indeed, Clapper *consented* to the entry of the judgment, and nothing precludes him from seeking contribution against ART. In fact, as stated elsewhere in this opinion, the circuit court granted Clapper's motion for summary disposition against ART with regard to Clapper's contribution claim.[1] Nothing unfair or unjust occurred here. Nor do we find merit to Clapper's argument that failing to deem the judgment satisfied here would set a precedent for judgment creditors to "forum shop." This is not a persuasive argument because a creditor would not be able simply to choose a forum that had no connection to the pertinent parties.

Clapper additionally argues that the intent of Inland and TacCo was to deem the judgment satisfied after the assignment of the judgment to TacCo. This was clearly not the case, given that Inland retained a security interest in the judgment. Clapper also suggests that the assignment of the judgment to TacCo resulted in a reduction of the judgment because a principal of Inland admitted that "[i]f the judgment

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[1] The dissent suggests that ART, "being the alleged alter ego of TacCo, essentially pays nothing for the property . . . ." This is not an accurate characterization. Assuming, for purposes of argument, that ART was TacCo's alter ego, then TacCo/ART paid $1,000,000 at the Sheriff's sale *and* is subject to Clapper's 50% contribution claim (amounting to approximately $1,100,000). As noted, the trial court granted summary disposition to Clapper with regard to the contribution claim, and we are affirming that decision on appeal.

ever comes back into [Inland's] hands . . . ART gets credit for the one million five . . . because they [ART] paid it." This suggestion is nothing more than a partial reiteration of the strawman defense discussed earlier. In other words, Clapper is arguing that the judgment was satisfied, in part, because it was ART that made the payment to Inland. We have already rejected the strawman argument and will not reiterate our holding here. Inland assigned to TacCo the right to collect on the full judgment, in exchange for consideration paid by TacCo. TacCo now has the right to collect on the full judgment.

As an alternative basis for reducing the amount of the judgment, Clapper argued in the circuit court that the price paid by TacCo for the apartment complex at the Sheriff's sale was inadequate, that the sale was essentially equivalent to a fraudulent conveyance, and that the inadequate price resulted in the judgment against Clapper being higher than it should have been. Clapper indicated, among other things, that the property had been appraised at $1.95 million a few months after the sale. The circuit court rejected Clapper's arguments, stating, with regard to the appraisal, that the evidence demonstrated that a property might actually sell at twenty-five percent less than the appraisal price. The court also stated that "the fact that a better price could have been obtained is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner."

Clapper now reiterates his arguments on appeal, and we find no error requiring reversal. Alleged price inadequacy is not a valid reason to vitiate a foreclosure sale, if the proceedings were fair and regular. *Chabut*

v Chabut, 66 Mich App 440, 448; 239 NW2d 401 (1976). Clapper has produced insufficient evidence that any procedural impropriety occurred with respect to the Sheriff's sale.[2]

Under all the circumstances, the circuit court did not err in granting TacCo's motion for summary disposition.[3]

Clapper next argues that the circuit court erred in dismissing his contribution claim against ARI. The court granted summary disposition to Clapper with respect to his contribution claim against ART but dismissed his claim against ARI. The court stated: "Although Defendant states numerous times in its pleadings and argument that ARI is the successor of ART, he provides no evidentiary support for that allegation and, thus, there is no basis for contribution as to ARI."

Clapper moved for summary disposition under MCR 2.119(C)(9) and (C)(10). This court's obligations when reviewing a summary disposition motion brought under MCR 2.116(C)(10) are discussed above. "Summary disposition under MCR 2.116(C)(9) is proper if a defendant fails to plead a valid defense to a claim." *Village of Dimondale v Grable*, 240 Mich App

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[2] We also note that the appraised price was not dispositive, given that the appraisal witness did indeed indicate that the price obtained at a foreclosure sale could be more than twenty-five percent less than the appraised price.

[3] Accordingly, the circuit court also did not err in denying Clapper's motion for summary disposition.

553, 564; 618 NW2d 23 (2000). In reviewing a motion brought under MCR 2.116(C)(9), we accept "all well-pleaded allegations as true" and will grant the plaintiff's motion if the defenses are untenable as a matter of law. *Id.* We note, however, that the circuit court did not merely deny Clapper's motion for summary disposition with regard to the contribution claim against ARI. Instead, it went a step further and dismissed the claim against ARI, even though ARI had not itself moved for summary disposition on the basis of its not being, in actuality, the successor to ART. Evidently, the court's ruling was based on MCR 2.116(I)(2), which states: "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment without delay."

ARI argues that the circuit court correctly dismissed the case against it because Clapper presented insufficient documentary evidence to prove that ARI was ART's successor. However, Clapper *did* produce documentary evidence to this effect, including a Securities and Exchange Commission report that states that ARI "is the successor through merger" to ART. ARI argues that this Court should not consider the documentary evidence because it was submitted with a reply brief and not with Clapper's original motion for summary disposition. The fact that Clapper did not attach documentary evidence to his original motion for summary disposition was sufficient for the circuit court to have denied Clapper's motion regarding ARI. However, as noted above, the court not only denied Clapper's motion but also *granted* summary disposition to ARI, despite the fact that ARI did not move for summary disposition on the basis in question.

This dismissal of ARI was erroneous, given that, at the very least, Clapper raised a genuine issue of material fact regarding whether ARI was the successor to ART.[4]

In its cross-appeal, ART contends that the circuit court erred in denying its motion for summary disposition with regard to Clapper's contribution claim.[5] ART moved for summary disposition under MCR 2.116(C)(6) and (C)(8). MCR 2.116(C)(8) allows for summary disposition if "[t]he opposing party has failed to state a claim on which relief can be granted." In reviewing a motion brought under this subrule, "we assume that all factual allegations in the nonmoving party's pleadings are true and determine if there is a legally sufficient basis for the claim." *Salinas v Genesys Health System*, 263 Mich App 315; 688 NW2d 112 (2004). MCR 2.116(C)(6) allows for summary disposition if "[a]nother action has been initiated between the same parties involving the same claim." In reviewing a motion brought under MCR 2.116(C)(6), we consider the "[a]ffidavits, depositions, admissions, and documentary evidence offered," MCR 2.116(G)(5), and determine whether the two suits were "based on

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[4] ARI, as alternative bases for us to affirm the dismissal of the third-party claim against it, raises arguments similar to those raised by ART and discussed later in this opinion. We reject ARI's arguments for the same reasons that we reject the similar arguments raised by ART.

[5] Although this fact is not emphasized by ART on appeal, we reiterate that the circuit court, in addition to denying ART's motion for summary disposition, *granted* Clapper's motion for summary disposition with respect to the contribution claim against ART.

the same or substantially same cause of action." *Ross v Onyx Oil & Gas Corp*, 128 Mich App 660; 341 NW2d 783 (1983).

ART first contends that Clapper was not permitted to sue ART, a joint obligor, until Clapper had paid more than his share of the joint obligation. See *Kalamazoo Trust Co v Merrill*, 159 Mich 649, 655; 124 NW 597 (1910) ("[o]ne joint obligor may not sue another joint obligor, upon their common obligation, until he has paid the debt, or a larger portion thereof than, as between himself and his co-obligor, he would be liable to pay"), and *Kelly v Sproul*, 153 Mich 691, 692-693; 117 NW 327 (1908) ("the right of action for contribution does not accrue until payment is made"). See also *Sziber v Stout*, 419 Mich 514, 534; 358 NW2d 330 (1984). ART contends that Clapper had *not* in fact paid more than his share of the joint obligation and therefore could not proceed against ART. The circuit court, in ruling on this issue, perfunctorily stated that Clapper need not have paid more than his share of the obligation before suing ART.

We conclude that no error requiring reversal occurred. First, Clapper did not file a separate lawsuit against ART but instead filed a third-party complaint. This was explicitly authorized under MCR 2.204(A)(1), which states, in pertinent part: "[A]ny time after commencement of an action, a defending party, as a third-party plaintiff, may serve a summons and complaint on a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim." Second, plaintiff deposited the amount of TacCo's judgment with the circuit court. Clapper admits in his appellate brief that "[i]f Clapper

is unsuccessful on his appeal as to the TacCo issues, then TacCo will be entitled to the entire $2.5 million." The circuit court was mindful of Clapper's possible payment to TacCo and explicitly stated, in its order, as follows:

> [J]udgment is hereby entered in the amount of 50% (fifty percent) of the amount paid by Third-Party Plaintiff to Plaintiff, provided that execution of this judgment is precluded until payment by Defendant/Third-Party Plaintiff of an amount in excess of 50% of Plaintiff's judgment against Defendant/Third-Party Plaintiff, in which even Defendant/Third-Party Plaintiff may have execution of this Judgment against Third-Party Defendant ART for the excess.

Therefore, the court indicated that Clapper would not, in actuality, be able to successfully execute his claim against ART until *after* Clapper paid TacCo. Under the circumstances, we find no viable basis on which to reverse the circuit court's ruling.

ART argues that MCR 2.204(A)(1) was not applicable here because the instant action was nothing more than an action to domesticate a judgment, "i.e., to determine whether the Indiana court had jurisdiction over Clapper such that its determination with respect to Clapper should be recognized against Clapper in Michigan." ART states that because this action was merely an action to domesticate a judgment, there was no possible way that ART could be liable to Clapper for TacCo's claim. The circuit court rejected this argument, stating that the case involved

the *enforcement* of a judgment and that Clapper's contribution claim could proceed. We again find no basis for reversal. TacCo filed a complaint to enforce the judgment, and the resultant lengthy litigation has revolved around whether Clapper should be responsible for paying the amount owed under the judgment. Clearly, Clapper's liability for paying the judgment has been a central issue in the case, and, as noted above, Clapper has deposited the amount of TacCo's judgment with the circuit court. Because Clapper's liability for paying the judgment has been at issue, ART's liability for contribution has also been at issue. Reversal is unwarranted.

ART next argues that the circuit court should have granted its motion for summary disposition under MCR 2.116(C)(6) because a substantially identical claim had been filed by Clapper against ART in a federal court in Texas. However, the Texas lawsuit sought indemnification and was based on an indemnification agreement. "Contribution and indemnification are separate and distinct claims." *Hertz Corp v Volvo Truck Corp*, 210 Mich App 243, 248; 533 NW2d 15 (1995). In the present case, Clapper is seeking not indemnification but contribution, asserting that he is entitled to contribution from ART by virtue of the fact that ART is a co-judgment debtor. See *Caldwell v Fox*, 394 Mich 401, 417 231 NW2d 46 (1975). Given these circumstances, summary disposition under MCR 2.116(C)(6) was not warranted.

Next, ARTM argues that the circuit court, in reviewing Clapper's motion for summary disposition against ART and ARTMLP with regard to the contribution claim, should have granted summary

disposition to ARTMLP under MCR 2.116(I)(2) because ARTMLP had been dissolved. As noted earlier, MCR 2.116(I)(2) states: "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment without delay."

In June 2003, a United States District Court in Texas entered a final judgment that dissolved ARTMLP, appointed ARTM and ARI as a co-liquidators to wind up and liquidate the partnership, and ordered them to submit appropriate documentation for the windup. The Texas District Court approved the windup plan on January 7, 2004, and on July 14, 2004, ARTM filed a Certificate of Cancellation of Domestic Limited Partnership with the Texas Secretary of State.

On June 13, 2006, in ruling on ARTM's argument below, the circuit court correctly noted that Clapper's third-party complaint against ARTMLP was filed "after dissolution began but before the certification of cancellation was filed." The court concluded that, under Texas law, a partnership can "defend a civil . . . action" during the "winding up process." The court stated: "Thus, because this case was filed in 2002 before the certificate of cancellation was filed in July 2004, the defendant may proceed against [ARTMLP]." However, as noted above, the Texas court approved the windup plan for ARTMLP on July 14, 2004. In that windup plan, ARTM and ARI stated the following:

> Because no assets are left in the Partnership, no further action is required to wind up the Partnership other than for this

> Court to approve the winding up . . . and, after the Court enters such order, for a certificate of cancellation of domestic limited partnership to be filed with the State of Texas.

As also noted above, ARTM filed the certificate of cancellation on July 14, 2004. Under these circumstances, it is clear that ARTMLP had been *cancelled* at the time of the circuit court's ruling in this case. Accordingly, the circuit court erred in failing to grant summary disposition to ARTM with regard to the contribution claim against ARTMLP. Clapper argues that a partnership may still be sued during the dissolution process and that part of the windup procedure necessarily involves the resolution of outstanding court cases. However, that argument was pertinent *to the Texas action governing the dissolution of the partnership*.[6] On the record before us, we have no choice but to conclude that the partnership was cancelled as of July 14, 2004, and that the circuit court therefore should have dismissed Clapper's contribution claim against ARTMLP.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Alton T. Davis

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[6] Clapper had notice of and participated in the Texas proceedings.

O'CONNELL, J. *(dissenting).*

I respectfully dissent. I would vacate the trial court's decision to grant summary disposition and would remand this case for a full evidentiary hearing to determine both whether the original judgment has been satisfied and to determine the individual responsibilities of each defendant involved in this litigation.

It appears to me that the trial court and the majority opinion conflate the concept of full faith and credit with the concept of satisfaction of judgment. In the present case, I concur with the majority opinion that a foreign judgment is entitled to full faith and credit. However, based upon this lower court record, I am unable to determine if this judgment has been satisfied.[1]

It is simply common sense to conclude that you cannot enforce a judgment that has been satisfied. In the present case, the trial court refused to conduct an evidentiary hearing to determine if the foreign judgment had been satisfied, and the majority opinion seems willing to allow plaintiff to collect on a judgment whether or not it has already been satisfied.

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[1] The majority and the trial court also conflate the issues of whether enforcement proceedings are available and whether the judgment has been satisfied. I concur with the majority that we apply Michigan law to enforcement proceedings. However, I note there is no enforcement proceeding if the judgment has been satisfied.

Defendant Clapper is not attempting to raise any defenses regarding the validity of the foreign judgment; in fact, he admits that it is a valid judgment. His position is that the judgment has been paid.[2]

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[2] Defendant Clapper raises a significant issue that should be examined on remand. Clapper contends that plaintiff TacCo Falcon Point, Inc., (TacCo) and the balance of the parties to this litigation are perpetrating a shell game. The end result of the shell game is that Clapper is responsible to pay $2.5 million for investment property, but TacCo and the other parties to this litigation end up with fee simple title to the investment property that secured the original mortgage. Based upon this lower court record, I am unable to determine if this is the result of legitimate corporate activity, or if plaintiff is using the judicial systems in Michigan, Indiana, and Texas to divert the Court's attention from the fact that the consent judgment has already been paid by the liable parties.

Defendant Clapper alleges that American Reality Trust, Inc. (ART) and he were responsible to Island Mortgage Company (Island) for a mortgage in excess of $3 million and that they defaulted and later entered into a consent judgment with Island. The shell game begins when ART's alleged alter ego TacCo purchases both the consent judgment and the property and makes a partial payment on the consent judgment and mortgage. The shell game continues with court proceedings in Texas, Indiana, and Michigan, concluding with collection proceedings in Michigan against defendant Clapper. Amazingly, Clapper ends up paying full price for the property but TacCo ends up with fee simple title to the investment property. ART, of course, being the alleged alter ego of TacCo, essentially pays nothing for the property but ends up with the benefit of the original transaction (original price - Clapper payment = 0). From this record I am unable to determine how such an event occurred or even if it occurred. However, on remand and after an evidentiary hearing, the trial court could

I would vacate the lower court judgment and remand to the trial court to conduct an evidentiary hearing to determine if this judgment has been paid and, if paid, the individual defendants' relative responsibilities for indemnification and contribution. Because of the multifaceted issues in this case, I would direct the trial court to issue a comprehensive written opinion that addresses all of the issues that are presented at the evidentiary hearing. I would also direct the trial court to allow testimony on the relationships of all of the parties (i.e., whether they are alter egos of the original corporation, whether the stockholders are related, etc., and the various corporations). Finally, the trial court should make specific findings on why it was necessary to use numerous corporations and both the federal and state courts to perform the relatively simple task of executing a judgment.

/s/ Peter D. O'Connell

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determine whether the Michigan court system is being used to further the ends of a shell game and should deal with this case accordingly.

APPENDIX B

STATE OF MICHIGAN OAKLAND COUNTY
SIXTH JUDICIAL CIRCUIT

Court Address 1200 N. TELEGRAPH RD DEPT 404
PONTIAC MI 48341-0404

No. 2002-042917-CZ

[Filed June 1, 2006]

TacCo Falcon Pointe, Inc. PLAINTIFF(S)	)
v.	)
David M. Clapper, et al. DEFENDANT(S)	)

ORDER

For reasons stated on the record on May 31, 2006;

Plaintiff's Motion for Summary Disposition as to Defendant, seeking enforcement of its domesticated Judgment, is granted in its entirety and all of Defendant's claims and defenses as to Plaintiff are dismissed.

Defendant's Motion for Summary Disposition as to Plaintiff is denied.

Defendant/Third-Party Plaintiff's Motion for Summary Disposition as to Third-Party Defendant American Realty Trust, Inc. ("ART") is granted and judgment is hereby entered in the amount of 50% (fifty percent) of the amount paid by Third-Party Plaintiff to Plaintiff, provided that execution of this judgment is precluded until payment by Defendant/Third-Party Plaintiff of an amount in excess of 50% of Plaintiff's judgment against Defendant/Third-Party Plaintiff, in which event Defendant/Third-Party Plaintiff may have execution of this Judgment against Third-Party Defendant ART for the excess.

Defendant Third-Party Plaintiff's Motion for Summary Disposition brought as to Third-Party defendant American Realty Investors, Inc. ("ARI") is denied, and Defendant/Third-Party Plaintiffs claim against ARI is dismissed.

Defendant Third-Party Plaintiff's Motion for Summary Disposition is denied to the extent it seeks a judgment for contribution as to ART Midwest, LP.

Approved as to Form only:

/s/ Andrew W. Mychalowych
Attorney for Defendant

/s/ Peter A. Jackson
Attorney for ART and ARI

/s/ Steven R. Lefkofsky
Attorney for Plaintiff

6/1/06	/s/	P17653
DATE	FRED M. MESTER, Circuit Judge	BAR NO.

APPENDIX C

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

SC: 133430
COA: 271525
Oakland CC: 2002-042917-CZ

[Filed June 4, 2008]

TACCO FALCON POINT, INC.,
Plaintiff/Counter-Defendant-Appellee,

v

DAVID M. CLAPPER,
Defendant/Counter-Plaintiff/
Third-Party Plaintiff-Appellant/
Cross-Appellee,

v

ART MIDWEST, INC.,
Intervening Third-Party
Defendant-Appellee,

and

AMERICAN REALTY INVESTORS, INC.,

and AMERICAN REALTY TRUST, INC.,)
Third-Party Defendants-Appellees/)
Cross-Appellants,)
)
and)
)
ART MIDWEST, L.P.,)
Third-Party Defendant.)
)

On order of the Court, the application for leave to appeal the February 1, 2007 judgment of the Court of Appeals and the application for leave to appeal as cross-appellant are considered, and they are DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

CAVANAGH, J., would remand this case to the trial court for the reasons stated in the Court of Appeals dissenting opinion.

[Seal of the Michigan Supreme Court]

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 4, 2008 Corbin R. Davis
Clerk